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(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the United States Supreme Court

Richard A. Prewitt

v.

City of Oxford, Oxford Municipal Court, Lawrence L. Little

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

Petition for Writ of Certiorari

Richard A. Prewitt
P.O. Box 1226
Greenville, MS 38702-1226
662-380-6172

(a) Questions presented for review.

1. Whether the Mississippi Supreme Court may retroactively apply indefensible, unexpected changes in its prior law which (a) ended collateral challenges to allegedly void judgments that were formerly authorized under prior Mississippi case law, (b) expanded the criminal coverage of MCA 67-1-81 to include conduct which was formerly innocent conduct, and (c) imposed sentences which were not authorized under MCA 67-1-81(2)?

2. Whether incontrovertible proof of actual innocence is sufficient to vacate a conviction in a collateral challenge or in a direct challenge?

3. Whether double jeopardy prevents a trial-de-novo method of appeal when the initial conviction was alleged to be void for lack of subject matter jurisdiction and where the petitioner is innocent as a matter of law?

(b) All parties are listed in the caption.

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d) The case is cited as Prewitt v. City of Oxford, Mississippi, 2010 Miss. LEXIS 184, (Miss. 2010), Rehearing denied Prewitt v. City of Oxford, 2010 Miss. LEXIS 278 (Miss., June 3, 2010).

(e) Jurisdiction is based on 28 U.S.C. 1257. Federal claims were expressly raised in the complaint, in the appeal, and in the motion for rehearing.

(f) Article I, § 9, 3, i.e., "No bill of attainder or ex post facto law shall be passed."

Article I, § 10, 1, "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility."

14th Amendment, in part, i.e., " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."
MCA § 67-1-81(2), in part, "Any person under the age of twenty-one (21) years who purchases, receives, or has in his or her possession in any public place, any alcoholic beverages, shall be guilty of a misdemeanor and shall be punished by a fine of not less than Two Hundred Dollars ($200.00) nor more than Five Hundred Dollars ($500.00)."

MCA § 67-1-5(a), in part, "Alcoholic beverage" means any alcoholic liquid, including wines of more than five percent (5%) of alcohol by weight, capable of being consumed as a beverage by a human being, but shall not include wine containing five percent (5%) or less of alcohol by weight and shall not include beer containing not more than five percent (5%) of alcohol by weight, as provided for in Section 67-3-5, Mississippi Code of 1972, but shall include native wines."

Article 6, § 159, in part, "The chancery court shall have full jurisdiction in the following matters and cases, viz.: (a) All matters in equity; (b) Divorce and alimony; (c) Matters testamentary and of

administration; (d) Minor's business;...."

§ 25-1-47, in part, "(1) Any municipality of the State of Mississippi is hereby authorized and empowered within the discretion of its governing authorities, to investigate and provide legal counsel for the defense of any claim, demand, or action, whether civil or criminal, made or brought against any state, county, school district, or municipal officer, agent, servant, employee, or appointee as a result of his actions while acting in the capacity of such officer, agent, servant, employee, or appointee; and such municipality is hereby authorized to pay for all costs and expenses incident to such investigation and defense."

(g) Statement of the Case

The African-American petitioner was issued a copy of a complaint, by one of the arresting officers in his capacity as a deputy municipal court clerk, which alleged that the petitioner, as a minor, had violated MCA § 67-1-81, and charged the petitioner with "minor in possession of alcohol." Trial testimony, by Officer Michelle Thompson, indicated that an unopened Budweiser Beer was

found in the rear seat area of the petitioner's unoccupied, parked vehicle at 11 pm on the night of May 6, 2008. Thompson testified that the beer was in "plain view" while the petitioner claims that he was told that he would be locked up if he did not consent to a vehicle search.

Although the petitioner was no longer a minor on November 19, 2008, the petitioner was convicted on November 19, 2008 in a non-jury trial of "possession of alcohol by a minor." The problem is that no such crime existed in Mississippi prior to November 19, 2008. The petitioner was sentenced to 30 days of community service with 25 suspended on two years good behavior, required to attend a BASICS alcohol program, and fined $619.50 even though the maximum statutory penalty, under MCA 67-1-81(2) which is the only statute with language which approximates the charge against the petitioner, was a fine of $500.

The petitioner then filed a collateral lawsuit challenging the November 19, 2008 conviction as void because under the Mississippi Constitution, Article 6, § 159(d), only the Mississippi Chancery Court has jurisdiction over minors. Under Mississippi case law which existed prior to the underlying April 8, 2010 state court decision in the underlying case,

it had been consistently held that "It is equally well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time." Duvall v. Duvall, 224 Miss. 546, 552, 80 So. 2d 752, 754 (1955). The petitioner also filed a direct appeal of his conviction, but alleged in the collateral lawsuit that because the appellate procedure consisted of a trial-de-novo and because prior Mississippi case law held that a Mississippi circuit court would lack appellate jurisdiction if subject matter jurisdiction was absent in a municipal trial court or a justice trial court, the trial-de-novo procedure, in a direct appeal from a trial court that lacked subject matter jurisdiction, was unavailable and legally inadequate.

Albert Smith, a Mississippi circuit court judge, dismissed, in his chambers and based on a 12(b)(6) motion, the collateral lawsuit as frivolous while candidly admitting that he had not even bothered to read the Duvall case. Judge Smith also fined the petitioner and his attorney almost $8000 in sanctions for filing the collateral lawsuit without considering the African-American attorney's argument that the Caucasian attorneys for the

defendants had been hired in violation of prior state law, in MCA § 25-1-47, which required that the respondents first investigate and then hire counsel to defend the respondents Oxford Municipal Court and Municipal Court judge Lawrence L. Little.

On appeal, the Mississippi Supreme Court, without distinguishing or citing the Duvall case, without mentioning the scope of MCA 67-1-81, and without addressing the petitioner's federal constitutional claims in the collateral complaint, affirmed the circuit court. The petitioner then filed a motion for rehearing which alleged, in part, violations of the federal ex post facto clause and the federal due process clause because the Mississippi Supreme Court had affirmed changes in prior Mississippi law and had affirmed the retroactive application of those changes in prior law to the petitioner's case. The petitioner alleged, in part, that;

(a) prior Mississippi law, in Duvall, had authorized a collateral challenge to an alleged void judgment;

(b) prior Mississippi law, in Jordan v. City of West Point, 75 So. 2d 465 (Miss. 1954) held that;

> "If a justice of the peace has no jurisdiction, the circuit court acquires none upon appeal.

Ivy v. State, 141 Miss. 877, 106 So. 111. The affidavit is a prerequisite to prosecution for misdemeanor. Code 1930, Sec. 2098. The affidavit is the foundation of the jurisdiction of the justice of the peace. Coulter v. State, 75 Miss. 356, 22 So. 872; 22 C.J.S., Criminal Law, Sec. 303, p. 457, and the court has no jurisdiction without it. Bigham v. State, 59 Miss. 529, The foregoing principle is equally applicable to a prosecution in the mayor's court";

(c) that MCA 67-1-81(2) had been unlawfully expanded to include formerly innocent conduct because the petitioner had not possessed an alcoholic beverage in a public place as required by MCA 67-1-81(2);

(d) the petitioner's sentence exceeded the statutory maximum of $500 under MCA 67-1-81(2); and

(e) the Mississippi Supreme Court could not act as an impartial tribunal in determining whether prior Mississippi law had been changed in a manner which violated the federal constitution.

The petitioner also asserted that the Mississippi Supreme Court had ignored his claims that (1) The discovery requirements in Brady v.

Maryland, 373 U.S. 83 (1963) were violated when the Mississippi Supreme Court ignored the complaint's charge that the prosecution concealed the fact that one of the arresting officers, Bobby Kelly, issued a sworn criminal complaint in his capacity as a deputy court clerk and thereby caused a jurisdictionally defective (elements of a non-existent crime were listed) affidavit to be issued by a non-neutral magistrate; (2) Berkemer v. McCarty, 468 U.S. 420 (1984) was violated when the Mississippi Supreme Court ignored the complaint's charge that Miranda warnings were systematically denied to persons charged with misdemeanors in the Oxford Municipal Court; and
(3) that the Mississippi Supreme Court authorized judicial sanctions to be imposed against an African-American attorney while failing to consider the African-American attorney's claim that the private attorneys for the respondents had been hired in violation of a state statute in MCA 25-1-47. On June 3, 2010, the Mississippi Supreme Court denied, without comment, the petitioner's motion for rehearing.

(h) Argument

This case amply demonstrates the absence of legal clarity and the retroactive application of changes in prior Mississippi law which characterizes judicial proceedings in some Mississippi courts. While paying the requisite, overt tribute to the grand scheme of the U.S. Constitution, some Mississippi courts regularly shred the base of that august document, i.e., that the application of law must be preceded by fair warning, of its requirements, in constitutions, statutes, and case law. Some Mississippi courts have long discovered that vague pronouncements, couched in code-words from which only the true insiders benefit, is preferable for dealing with undesirables who appear in some state courts and for avoiding meaningful judicial review by federal judges without ties to Mississippi's close-knit community of judicial insiders in some courts. John Rawls' "veil of ignorance" has been transformed into an ex post facto gateway where some Mississippi judges' view of the respective parties is outcome-determinative.

This Court's Rule 10(c) provides that certiorari may be granted if "a state court or a United States court of appeals has decided an important

question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The Mississippi Supreme Court, in the underlying case, changed prior Mississippi case law and expanded the coverage of a criminal statute in a manner which violates the interstitial relationship between the Due Process Clause and the Ex Post Facto Clause of the federal constitution.

The writ of certiorari should be granted for the following reasons;

1. The petitioner, whose liberty is under the restraint of (a) bail, (b) a sentence of 30 days community service with 25 suspended on 2 years good behavior, and (c) attendance at a BASICS alcohol program, is actually innocent, as a matter of law, of a violation of MCA 67-1-81 for he did not have an alcoholic beverage in a public place as required under prior law and under existing law in Mississippi. Prior Mississippi case law, in Richmond v. City of Corinth, 816 So. 2d 373, 377-78 (Miss. 2002), defined a public place "as one wherein, by general invitation, members of the public attend for reasons of business, entertainment, instruction or the like, and are welcome so long as they

conform to what is customarily there done." Yet, the sole evidence against the petitioner, an unopened Budweiser Beer, was found within his parked vehicle, and the petitioner's parked vehicle is not a public place under Richmond.

Under prior Mississippi law in MCA 67-1-5(a), the unopened Budweiser Beer was not an alcoholic beverage. The Budweiser Beer, ostensibly in the possession of Mississippi's prosecutors, contains 5 percent of alcohol **by volume** while MCA 67-1-5(a) defines an alcoholic beverage as containing 5 percent of alcohol **by weight**. The petitioner is innocent of the jurisdictionally-defective charge as a matter of law under prior Mississippi law and under existing Mississippi law.

2. The Mississippi Supreme Court changed its prior law and retroactively applied those changes to the underlying case in a manner which conflicts with Bouie v. City of Columbia, 378 U.S. 347 (1964) and Rogers v. Tennessee, 532 U.S. 451 (2001). The above changes to Mississippi's prior law, in Richmond and in MCA 67-1-5(a), were exacerbated by the following, additional changes in prior law in Mississippi which were retroactively applied to the petitioner's case;

(a) In Duvall v. Duvall, 224 Miss. 546, 80 So.2d 752

(1955), the Mississippi Supreme Court had held that a collateral lawsuit could be used to challenge an allegedly void judgment. The petitioner's complaint alleged that his conviction was void because the Mississippi Constitution, in Article 6, Section 159, gives the Chancery Courts subject matter jurisdiction over minors. Thus, the Mississippi Constitution was unlawfully changed by the Oxford Municipal Court's assumption of subject matter jurisdiction over a charge involving a minor, and, thus, the resulting conviction of the petitioner by the Oxford Municipal Court, on a charge that can only be committed by a minor, is void. Under Duvall, the petitioner's collateral challenge to the void municipal court verdict was proper, but the Mississippi Supreme Court ignored the Duvall holding and retroactively applied that change to the petitioner's case, a violation of the decisions in Bouie and Rogers, supra.

(b) Prior Mississippi law, in Jordan v. City of West Point, 75 So.2d 465 (Miss. 1954), supra, had held that (1) the affidavit is the foundation of jurisdiction in a municipal court or justice court, and (2) absent jurisdiction in the municipal court or justice court, the circuit courts of Mississippi cannot acquire appellate jurisdiction on direct appeal. Both of the

above postulates were overturned and retroactively applied to the petitioner's case (a) when a defective complaint was issued by a non-neutral official, i.e., one of the arresting officers, and (b) when the Mississippi Supreme Court held that a direct appeal, by trial-de-novo in a Mississippi circuit court, was the only appellate route for a decision which was alleged by the petitioner to be void for lack of subject matter jurisdiction.

(c) On April 8, 2010, the Mississippi Supreme Court changed its 12(b)(6) standards and retroactively applied those changes to the petitioner's case. Prior 12(b)(6) Mississippi case law, in Wilbourn v. Equitable Life Assurance Society of the United States, 998 So.2d 430 (Miss. 2008) and Weeks v. Thomas, 662 So.2d 581 (Miss. 1995) had held that (1) if a trial judge considered evidence from outside the complaint that he must convert the 12(b)(6) motion into a summary judgment motion and provide notice to the parties, and (2) if a party was entitled to **any** relief from a Mississippi court, then a 12(b)(6) motion could not be granted. On April 8, 2010, the Wilbourn and Weeks holdings were ignored and that change was retroactively applied to the petitioner's case when the

Mississippi Supreme Court approved the consideration of extra-complaint evidence and when the Mississippi Supreme Court affirmed language indicating that the petitioner was bound to the precise mandamus relief he sought in his complaint even though the petitioner's complaint also sought declaratory and injunctive relief.

3. The petitioner's sentence, i.e., 30 days community service with 25 suspended on two years good behavior, attendance at a BASICS alcohol program, and a $619.50 fine, exceeds the statutory maximum, in MCA 67-1-81(2), of a $500 fine. Prior Mississippi law had held that an illegal sentence violates fundamental rights in Mississippi. Luckett v. State, 582 So. 2d 428, 430 (Miss. 1991).

4. The Mississippi Supreme Court has assigned Circuit Judge Albert Smith as a "special judge" to preside over the second criminal trial of the petitioner. Smith is the same judge who candidly confessed, in the petitioner's underlying case, that he did not bother to read the Duvall case, which expressly authorized collateral challenges to void judgments, prior to issuing sanctions of almost $8000 for the filing of what Smith termed a frivolous collateral challenge to an allegedly void judgment. Aside from the constitutional

implications, I.e., double jeopardy, Bouie violation, of prosecuting a demonstrably innocent individual in a trial-de-novo appellate route which has been declared unlawful in prior Mississippi case law where subject matter jurisdiction was lacking in the initial trial, I.e., Jordan, supra, the assignment of the same judge, who has confessed to a willful ignorance of a case that was arguably on point, speaks volumes about the total absence of fundamental fairness in some Mississippi court proceedings.

(i) Appendix

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-CA-00684-SCT

RICHARD A. PREWITT

v.

CITY OF OXFORD, MISSISSIPPI, OXFORD MUNICIPAL COURT AND LAWRENCE L. LITTLE

DATE OF JUDGMENT:
TRIAL JUDGE:
COURT FROM WHICH APPEALED:
ATTORNEY FOR APPELLANT:
ATTORNEYS FOR APPELLEES:
NATURE OF THE CASE:
DISPOSITION:
MOTION FOR REHEARING FILED:
MANDATE ISSUED:
04/16/2009
HON. ALBERT B. SMITH, III
LAFAYETTE COUNTY CIRCUIT COURT

GEORGE DUNBAR PREWITT, JR.
PAUL BOWIE WATKINS, JR.
POPE SHANNON MALLETTE
CIVIL - OTHER
AFFIRMED - 04/08/2010
BEFORE GRAVES, P.J., DICKINSON AND CHANDLER, JJ.
GRAVES, PRESIDING JUSTICE, FOR THE COURT:
¶1.
After a misdemeanor conviction in municipal court, Richard A. Prewitt filed a collateral lawsuit in the Circuit Court of Lafayette County seeking writs of mandamus against the City of Oxford, the municipal court, and the municipal court judge. The City responded with a motion to dismiss and for sanctions. The trial court ultimately granted the City's motion to dismiss and ordered sanctions. Subsequently, Prewitt filed this appeal. Finding that the issues raised by Prewitt are without merit, we affirm the trial court.
FACTS AND PROCEDURAL HISTORY
¶2.
Prewitt, then age 20, was convicted of possession of alcohol by a minor in the Municipal Court of Oxford on November 19, 2008, after being found in possession of beer on the campus of the University

of Mississippi. Prewitt was fined, ordered to perform community service, and ordered to complete an alcohol program. Prewitt is represented by attorney George Dunbar Prewitt, Jr. (hereinafter collectively referred to as Prewitt).

¶3.

On November 26, 2008, Prewitt filed a "Complaint & Motion" in the Circuit Court of Lafayette County, Cause No. L08-769, seeking writs of mandamus against the City of Oxford, the Oxford Municipal Court, and Municipal Court Judge Lawrence Little (hereinafter collectively referred to as the City). In his complaint, Prewitt challenged the personal and subject matter jurisdiction of the municipal court, and asked the circuit court for "appropriate injunctive relief and declaratory relief, including costs and attorney's fees" and to find the conviction void as a matter of law. Prewitt sent a copy of the motion to the City's counsel, who responded with a letter on December 9, 2008, stating that a petition for writ of mandamus was not a valid means of appeal and requesting that Prewitt dismiss the complaint or risk sanctions under the Mississippi Litigation Accountability Act. Prewitt responded with a Motion for Hearing and for Injunctive Relief, seeking an immediate hearing

before Judge Henry Lackey on December 17, 2008. On December 16, 2008, the City filed a Motion to Dismiss and for Sanctions. The City further moved for dismissal for insufficiency of process pursuant to Rule 12(b)(4) and for failure to state a claim pursuant to Rule 12 (b)(6) of the Mississippi Rules of Civil Procedure. On December 18, 2008, Prewitt filed a Response to Defendants' Motion to Dismiss and for Sanctions. Prewitt asserted that the court clerk was at fault for failing to properly issue the summons. Prewitt also acknowledged that a proper appeal of the conviction would have required the payment of an appeal bond of $619.50, a cost-bond obligation of $100, and a filing fee of $104.50.

¶4. His immediate hearing was not granted. On December 19, 2008, Prewitt filed a notice of appeal for trial de novo of the municipal court conviction (Cause No. LK08-517MC). Thereafter, on January 12, 2009, the City filed a Supplement to Motion to Dismiss and for Sanctions, including this notice of appeal as an exhibit. The City asserted that it was withdrawing the insufficiency-of-process portion of its motion to dismiss because Prewitt had cured the deficiency, but asserted that dismissal was still proper under 12(b)(6) and in light of the

fact that Prewitt then had two matters challenging the conviction pending before the circuit court. ¶5.

A Notice of Hearing was filed on January 16, 2009, setting the hearing on the Motion to Dismiss and for Sanctions on February 12, 2009, before Judge Robert Elliot at the Marshall County Courthouse. An order of recusal, on the Court's own ore tenus Motion of Recusal, was entered January 26, 2009, recusing all three judges of the Circuit Court of Lafayette County. On February 3, 2009, this Court entered an order appointing Special Judge Albert B. Smith, III. The City then noticed the motion for hearing before Judge Smith on March 11, 2009, at the Bolivar County Circuit Courthouse.

¶6. On March 2, 2009, Prewitt filed a "Motion to strike the Defendants' pleadings, motions, responses, and the scheduling of a March 11, 2009 hearing in a Bolivar County site which is far removed from the location of the Lafayette County witnesses." On March 4, 2009, the City filed a Response to Plaintiff's Motion to Strike, asserting, in part, that Prewitt offered no support for his request and that the majority of Prewitt's motion contained 3 substantive arguments regarding his conviction, which he subsequently had appealed

in a separate action. The City further indicated that it had provided advance notice of the proposed hearing in Bolivar County and Prewitt had not then objected to the location. The trial court did not rule on Prewitt's motion prior to the hearing, and Prewitt filed a Petition for Extraordinary Relief, or in the Alternative, for Permission to File an Interlocutory Appeal with this Court, asking that the March 11, 2009, hearing be stayed. This Court denied Prewitt's petition by order entered March 10, 2009.

¶7.

After the March 11 hearing, the trial court announced its intention to grant the City's motion to dismiss, but asked for additional information regarding sanctions. The City filed a Supplement to Defendants' Motion for Sanctions on March 23, 2009. The trial court entered the Order of Dismissal on March 25, 2009, but held the motion for sanctions in abeyance pending further information. On April 3, 2009, Prewitt filed Plaintiff's Response and Objections to the "Supplement to Defendants' Motion for Sanctions." Prewitt asserted that he was not trying to circumvent the appropriate procedure, but merely invoking "both methods available under Mississippi law to contest

a void judgment, i.e., this collateral proceeding and the direct appeal that was filed on November 19, 2008." Prewitt also took issue with a statement in the order of dismissal that the trial court had offered, prior to the hearing, to hear the parties by telephone, presumably regarding any issue as to the location of the hearing. In addition, Prewitt argued various other points, including disputing the amount of attorneys' fees claimed by counsel for the City. The City replied and supplemented the motion for sanctions on April 7, 2009. On April 20, 2009, the trial court entered an Order Granting Sanctions in the form of attorney fees of $7,763.15 against Prewitt. Thereafter, Prewitt filed this appeal.

ANALYSIS

¶8. Prewitt asserts the following issues on appeal:

1. Whether a Mississippi Municipal Court has (a) subject matter jurisdiction over crimes involving a person who was a minor at the time the crime was allegedly committed, (b) subject matter jurisdiction over an appellant who was an adult at the time of the appellant's conviction, (c) subject matter jurisdiction over a minor who did not possess alcoholic beverages in a public place, and (d) subject matter jurisdiction over a citation/affidavit which did not allege the essential facts of the

alleged violation?
2. Whether a Mississippi Municipal Court has personal jurisdiction where a post-arrest citation, requiring the appellant's appearance in court, was issued by one of the arresting officers who could not be deemed a neutral and detached magistrate?
3. Whether a Mississippi Municipal Court has personal jurisdiction over a minor in the absence of formal process being issued to the minor and to the parents of the minor as required by In re Edwards, 298 So. 2d 703, 704 (Miss. 1974)?
4. Whether the venue statute, MCA 11-45-25, which requires that all litigation against a municipality be brought and heard in the county where that municipality is located, is exclusive and jurisdictional?
5.Whether Circuit Court Judge John Albert Smith III (a) erred in granting the appellee's 12(b)(6) motion to dismiss, and (b) whether Judge Smith's dismissal of the case, following a Bolivar County hearing of a case filed against the City of Oxford, Mississippi and City of Oxford officials in the Lafayette County Circuit Court, is void for lack of proper venue?
6. Whether the appellant properly relied on Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955), in filing

the collateral lawsuit which alleged a void judgment by the Oxford Municipal Court?
7. Whether Judge Smith erred in imposing $7,763.15 in sanctions for what Judge Smith termed a "frivolous" lawsuit?
8. Whether the attorneys for the appellees were lawfully hired pursuant to MCA 25-1-47?
9. Whether (a) a Budweiser Beer is an alcoholic beverage in Mississippi and (b) whether the rear floor of a vehicle is a public place within the meaning of MCA 67-1-81(2)?
10. Whether MCA 43-21-159 violates Section 159(d) of the Mississippi Constitution?
¶9. The actual issue in this matter is simply whether the trial court erred in granting the motion to dismiss and ordering sanctions for filing a frivolous action.
¶10. A motion to dismiss for failure to state a claim under Rule 12(b)(6) raises an issue of law, which is reviewed under a de novo standard, and tests the legal sufficiency of the complaint. Rose v. Tullos, 994 So. 2d 734, 737 (Miss. 2008). This Court must find that there is no set of facts that would allow the plaintiff to prevail. Id.
¶11. In the Order of Dismissal, the trial court found, in part, that: "Instead of appealing his conviction,

Plaintiff filed the instant lawsuit alleging numerous defects in the Municipal Court proceedings and seeking a writ of mandamus compelling Lawrence Little, the Municipal Judge, to vacate the conviction." The trial court also found that Prewitt filed the lawsuit to circumvent the appellate procedure, which would have involved paying a filing fee and posting an appeal bond and a cost bond.

¶12.

The trial court found that, although Plaintiff objected to the venue of the March 11, 2009, hearing, no subpoenas were issued for witnesses' attendance at the hearing and no testimony was taken. The trial court further found, as follows:

7. The March 11, 2009 hearing on this Motion was properly held at the Bolivar County Courthouse because Plaintiff consented to the hearing by his presence and because the Court was not required to hold any hearing on Defendants' Motion. Prior to the hearing date, the Court offered both parties the opportunity to be heard telephonically.

8. Clearly established Mississippi law provides that the writ of mandamus is an extraordinary remedy and may not be granted as a substitute for other review. See In re Chisolm, 837 So. 2d 183 (Miss.

2003). In Chisolm, the Mississippi Supreme Court held that a writ of mandamus was an improper method for a plaintiff to challenge his justice court conviction because all his objections could be addressed through the statutory appeal process, which provided for a trial de novo. The Chisolm Court also held that a writ of 6 mandamus may not be used to direct the outcome of an official action. The Court finds that Chisolm is directly on point and binding on this Court.

¶13. More importantly, the trial court found:

13. The Court finds that, assuming the truth of all the averments in Plaintiff's Complaint, Defendants have shown beyond a reasonable doubt that there is no set of circumstances under which Plaintiff would be entitled to the relief he seeks.

¶14. We find that the dismissal was proper. In Chisolm, this Court specifically said: "This Court will not allow a defendant, such as Chisolm, to circumvent the appellate process and seek such an extraordinary remedy when there is an adequate remedy at law." In re Chisolm, 837 So. 2d 183, 190 (Miss. 2003). Upon receipt of a copy of Prewitt's initial complaint, counsel for the City immediately brought this case to Prewitt's attention in their letter dated December 9, 2008.

¶15. As discussed previously herein, the trial court granted the dismissal, but held the motion for sanctions in abeyance, pending the City's submission of supplemental information regarding the request for sanctions. Thereafter, supplemental responses were filed. On April 20, 2009, the trial court entered an Order Granting Sanctions, granting attorney fees of $7,763.15 against Prewitt pursuant to the factors set out in Mississippi Code Section 11-55-7 of the Litigation Accountability Act and Rule 11(b) of the Mississippi Rules of Civil Procedure. See Mississippi Code Ann. § 11-55-7 (Rev. 2002).

¶16. This Court reviews awards of monetary sanctions under Mississippi Code Section 11-55-5 and Rule 11 of the Mississippi Rules of Civil Procedure for an abuse of discretion. In re Spencer, 985 So. 2d 330, 336-337 (Miss. 2008).

¶17. Mississippi Code Section 11-55-5 of the Litigation Accountability Act states, in relevant part:

[I]n any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment, and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or

attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment . . . .Miss. Code Ann. § 11-55-5(1) (Rev. 2002). Section 11-55-7 sets out the factors to be considered in determining the amount of an award of attorney's fees. Miss. Code Ann. § 11-55-7 (Rev. 2002).

¶18. Rule 11 of the Mississippi Rules of Civil Procedure permits a court to impose sanctions against a party or his attorney. Rule 11 provides, in relevant part: If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorney's fees. Miss. R. Civ. P. 11(b).

¶19. In granting sanctions of attorney fees of $7,763.15 against Prewitt pursuant to the Litigation Accountability Act and Rule 11(b) of the Mississippi Rules of Civil Procedure, the trial court said: 'The Court found that the action was a frivolous action

filed without substantial notification in order to harass the City of Oxford, Oxford Municipal Court and Lawrence L. Little as previously pointed out in the Order of Dismissal [sic] Findings of Fact and Conclusions of Law dated March 23, 2009."

¶20. We find that the record clearly supports a finding that Prewitt pursued a frivolous collateral action in circuit court and that the sanctions were appropriate.

CONCLUSION

¶21. For the reasons stated herein, we affirm the trial court's order of dismissal and entry of sanctions. Further, Prewitt is assessed the costs of this appeal.

¶22. AFFIRMED.

WALLER, C.J., CARLSON, P.J., DICKINSON, RANDOLPH, LAMAR,KITCHENS, CHANDLER AND PIERCE, JJ., CONCUR.

In the Supreme Court of Mississippi

No. 2009-CA-00684-SCT

Richard A. Prewitt

v.

City of Oxford, Mississippi, Oxford Municipal Court & Lawrence L. Little

Appellant's Motion for Rehearing

George Dunbar Prewitt, Jr.
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Bar #8314
662-931-2538

I. Preface

The Mississippi Supreme Court, in a decision written by Justice James E. Graves, Jr., issued an April 8, 2010 decision which, in violation of the U.S. Supreme Court decisions in Bouie v. City of Columbia, 378 U.S. 347 (1964) and Rogers v. Tennessee, 532 U.S. 451 (2001), (1) implicated the Ex Post Facto and Due Process Clauses in the U.S. Constitution, (2) overruled, **sub silentio**, a 55-year-old Mississippi Supreme Court decision on collateral lawsuits which challenge void court judgments, (3) overruled, **sub silentio**, Mississippi Supreme Court decisions on appellate jurisdiction of appeals from lower courts which acted without subject matter jurisdiction, (4) changed long-standing Mississippi law relating to 12(b)(6) motions to dismiss brought pursuant to the Mississippi Rules of Civil Procedure (MRCP), (5) ignored the violation of Mississippi criminal statutes which (a) exonerated Mr. Prewitt **as a matter of statutory law** and which (b) abridged Mr. Prewitt's fundamental right to a legal sentence, and (6) erased the prior legal distinction, concerning the availability of mandamus relief with respect to the mandatory duties and the discretionary duties of Mississippi public officials,

into an April 8, 2010 change in settled Mississippi mandamus law that was retroactively applied to this case. In short, Justice Graves overturned decades of Mississippi Supreme Court law and retroactively applied the April 8, 2010 changes in settled law to this case which had been filed in 2008.

Simply put, Justice Graves, and the Mississippi Supreme Court retroactively changed the legal rules in deciding this criminal appeal. Mississippi law defines an appeal as follows;

"[A]n 'appeal' is any complaint to a superior court of an injustice done by an inferior one in the general use of the word. Illinois Central R.Co. v. Moore, 215 So. 2d 419 (Miss. 1968). Black's Law Dictionary, 6th ed. (1990) defines 'appeal' as: 'Resort to a superior (i.e., appellate) court to review the decision of an inferior (i.e., trial) court or administrative agency. A complaint to a higher tribunal of an error or injustice committed by a lower tribunal in which the error or injustice is sought to be corrected or reversed.'" USPCI of Miss., Inc. v. State ex rel. McGowan, 688 So. 2d 783, ¶18 (Miss. 1997). (emphasis added).

The April 8, 2010 decision also failed to consider the complaint's allegations of other federal constitutional violations which rendered the Budweiser-beer-conviction void, including, in part, the systematic denial of Miranda rights to persons charged with misdemeanors and a failure to comply with federal discovery requirements. The April 8, 2010 decision imposed almost $8000 in a fine against Mr. Prewitt's attorney for filing the appellate challenge to a void criminal conviction based on a minor possessing an unopened Budweiser beer bottle. For the above reasons, and the reasons listed below, Mr. Prewitt, the appellant, requests a rehearing en banc.

However, the Mississippi Supreme Court should recuse itself, from rehearing this matter en banc, because the U.S. Constitution's Due Process Clauses require an impartial tribunal. Because Mr. Prewitt asserts that the Mississippi Supreme Court's retroactive changes in settled law have allegedly violated the above U.S. Supreme Court cases and the Due Process Clauses of the U.S. Constitution, the Mississippi Supreme Court cannot be an impartial tribunal in deciding the merits of its own alleged constitutional violations. See generally, Concrete Pipe & Products of Cal., Inc. v.

Construction Laborers Pension Trust for Southern Cal., 508 U. S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'" (quoting Ward v. Monroeville, 409 U. S. 57, 61-62 (1972)). In Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), the Supreme Court wrote the following;

"Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. ... **At the same time, it preserves both the appearance and reality of fairness**, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), **by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him**. ... We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. 2 Indeed, "**justice must satisfy the appearance of justice**," Offutt v. United

States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954), and this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). See also Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974). (emphasis added).

Because so many changes, from long-settled Mississippi Supreme Court precedent and Mississippi criminal statutes, were announced and retroactively applied by the Mississippi Supreme Court in this case on April 8, 2010, Mr. Prewitt's attorney feels that the U.S. Supreme Court's statement, i.e., "that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him", is particularly apt in this case. Something other than the mere evolution of Mississippi common law may be at work in this case where settled Mississippi case law was abruptly overturned, and Mississippi criminal statutes were retroactively altered, to coincide with an affirmation of the trial court decision. Therefore, to preserve the "appearance

of justice," this Court should request the Governor to appoint replacement judges to evaluate, in this motion for rehearing, the alleged violations, by the Mississippi Supreme Court, of the above U.S. Supreme Court cases, the Ex Post Facto Clause, and the Due Process Clauses of the U.S. Constitution.

II. Facts

In the April 8, 2010 decision, Justice Graves wrote the following:

"Prewitt, then age 20, was convicted of possession of alcohol by a minor in the Municipal Court of Oxford on November 19, 2008, after being found in possession of beer on the campus of the University of Mississippi. Prewitt was fined, ordered to perform community service, and ordered to complete an alcohol program. Prewitt is represented by attorney George Dunbar Prewitt, Jr. (hereinafter collectively referred to as Prewitt). ... On November 26, 2008, Prewitt filed a "Complaint & Motion" in the Circuit Court of Lafayette County, Cause No. L08-769, seeking writs of mandamus against the City of Oxford, the Oxford Municipal Court, and Municipal

Court Judge Lawrence Little (hereinafter collectively referred to as the City). In his complaint, Prewitt challenged the personal and subject matter jurisdiction of the municipal court, and asked the circuit court for "appropriate injunctive relief and declaratory relief, including costs and attorney's fees" and to find the conviction void as a matter of law." (emphasis added).

Justice Graves' decision materially misstated the above facts because Mr. Prewitt was not 20 years old at the time of his conviction on a charge of possessing an unopened Budweiser beer which was allegedly discovered as it lay in "**plain view**" on the rear floor of Mr. Prewitt's unoccupied vehicle at 11pm **at night** on May 6, 2008. In fact, Mr. Prewitt was 21 years old, and an adult, at the time of his Budweiser-beer-conviction for a crime that can only be committed by a minor. Contrary to Justice Graves' claim, the unopened Budweiser beer bottle was discovered, not on the University of Mississippi's campus, but in Mr. Prewitt's **unoccupied** vehicle which was **parked** in front of Mr. Prewitt's off-campus apartment.

But aside from the above material

misstatements, Justice Graves, and the Mississippi Supreme Court, somehow sidestepped the one fact that an impartial court might have found really relevant and that is the fact that Mr. Prewitt was, and is, **completely innocent** of the MCA 67-1-81(2) criminal charge **as a matter of Mississippi criminal law**. MCA 67-1-81(2), the **criminal** statute under which Mr. Prewitt was charged as a minor, required that Mr. Prewitt possess "alcoholic beverages" in a "public place". However, as strange as it may seem, a Budweiser beer of 5 percent alcohol by volume is not an alcoholic beverage under Mississippi's statutory definition, in MCA 67-1-5(a), of what constitutes an alcoholic beverage.

MCA 67-1-5(a) requires that a beer must have 5 percent of **alcohol-by-weight** before it becomes an alcoholic beverage in Mississippi. Because alcohol's density, as compared with water's density, is 0.79336 of water's density, the unopened Budweiser beer's 5 percent of **alcohol-by-volume** is equivalent to a beer with 3.9668 percent of **alcohol-by-weight** (which is calculated by multiplying the Budweiser beer's 5 percent of alcohol-by-volume by the alcohol/water density ratio of 0.79336 = 3.9668 alcohol-by-weight). Thus,

Mr. Prewitt's alleged, **unopened** Budweiser beer had an alcohol-**by-weight** measurement of only 3.9668 percent, and that fact conclusively demonstrates that the Budweiser beer in question is not an alcoholic beverage in Mississippi as a matter of Mississippi statutory law. In addition, the rear floor of an automobile is not a public place. Therefore, the Mississippi Supreme Court, in this case, not only approved the conviction of an innocent man, but the Mississippi Supreme Court also fined Mr. Prewitt's attorney almost $8000 for daring to file a legal complaint about the conviction of an innocent man and that is a monumental change from prior law.

Justice Graves' April 8, 2010 decision also approved Bolivar County Circuit Court Judge Albert Smith's order which stated that Mr. Prewitt's appellate challenge was simply "a frivolous action filed without substantial **notification** in order to **harass** the City of Oxford, Oxford Municipal Court and Lawrence L. Little." (emphasis added). The legal problem is that Judge Smith's order, in which he uses the term "substantial **notification**", differs from the "substantial **justification**" language in MCA 11-55-5 that was fashioned by the Mississippi Legislature in order to impose a monetary fine

under that statute. Even assuming that Judge Smith's erroneous language was merely technical in nature, the Mississippi Supreme Court cannot **legally** affirm an incorrect alteration of a Mississippi punitive statute without offending the Ex Post Facto Clause and the Due Process Clauses in the U.S. Constitution. Indeed, the "substantial **notification**" change, in apparent violation of the federal Ex Post Facto Clause and Due Process Clauses, was not an isolated occurrence in this case for the Mississippi Supreme Court repeatedly approved drastic changes in Mississippi law in resolving Mr. Prewitt's appellate challenge to his void conviction.

Mr. Prewitt's complaint contained express allegations that (1) Mr. Prewitt had received an illegal sentence in violation of Mr. Prewitt's fundamental right to be sentenced correctly under Mississippi law, (2) that violations of Mr. Prewitt's federal constitutional rights had taken place, i.e., including a deliberate refusal of the Oxford authorities to provide Miranda warnings to persons charged with misdemeanors in contravention of the U.S. Supreme Court decision in Berkemer v. McCarty, 468 U.S. 420 (1984), a refusal of the Oxford Municipal Court to require

the Oxford Police Department to comply with the discovery mandate in the U.S. Supreme Court case of Brady v. Maryland, 373 US 83 (1963), and (3) a claim that Mississippi Supreme Court decisions, prior to April 8, 2010, had declared that an appellate court cannot acquire jurisdiction over an appeal if the court below court lacked jurisdiction over the case. Mr. Prewitt's complaint, in part, included the following, express allegations;

- 'The criminal penalty, for a minor found guilty of possession of alcohol in a public place in violation of MCA 67-1-81(2), recites that 'Any person under the age of twenty-one (21) years who purchases, receives, or has in his or her possession in any public place, any alcoholic beverages, shall be guilty of a misdemeanor and **shall be punished by a fine of not less than Two Hundred Dollars ($200.00) nor more than Five Hundred Dollars ($500.00)**.'" (emphasis added).
- "Judge Little, in violation of Mr. Prewitt's fundamental right to be sentenced in conformity with state law in MCA 67-1-81(2), sentenced Mr. Prewitt to pay a **fine of $619.50**, ordered Mr. Prewitt to attend BASICS at the University of Mississippi, placed Mr. Prewitt on **probation for 2 years**, and ordered Mr. Prewitt to serve **30 days of community**

service with 25 days suspended." (emphasis added).

- "The potentially **empty** Budweiser bottle allegedly in Mr. Prewitt's possession was exculpatory evidence that was not made part of pre-trial discovery, nor was that potentially exculpatory evidence noted in Officer Thompson's May 7, 2008 police report, and now that potentially empty Budweiser bottle has mysteriously **disappeared**." (emphasis added).
- "Disregarding the discovery violations raised by the defendant and the requirements of Brady v. Maryland, 373 US 83 (1963) in addition to the requisites of Box v. State, 437 So. 2d 19 (Miss. 1983), Oxford Municipal Court Judge Lawrence I. Little found Mr. Prewitt guilty by asserting that less proof is required to meet the reasonable-doubt standard in a minor-in-possession case."
- "A reviewing court must determine if there was evidence "in favor of the defendant on any element of the offense" or whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' i.e., Boyd v. State, 977 So. 2d 329, 336 (¶25), (¶26) (Miss. 2008), in order to determine if a fundamental violation of due process occurred

which made the guilty verdict **void** and amenable to **injunctive relief** and **declaratory relief**.'" (emphasis added).

- "Judge Little's complete disregard for the command in Berkemer v. McCarty, 468 U.S. 420 (1984), i.e., that Miranda warnings are required for an arrested defendant "regardless of the nature or severity of the offense of which he is suspected or for which he was arrested", legitimates, at least in the Oxford Municipal Court, (a) the systematic failure of the Oxford Police Department to provide Miranda warnings to Mr. Prewitt and to all arrested citizens charged with misdemeanors, and (b) the use of Mr. Prewitt's minor status, which was obtained in questioning of Mr. Prewitt by Oxford Police Officers, against Mr. Prewitt in the November 19, 2008 trial for possession of alcohol by a minor in a public place."
- "Mr. Prewitt lacks an adequate remedy at law because the appellate procedure, for appeals from municipal courts to circuit courts, contemplates a trial de novo and a trial de novo cannot cure a lack of subject matter jurisdiction in the lower court."
- "Under Mississippi law, if a lower court lacks jurisdiction, the circuit court cannot exercise

jurisdiction over an appeal. Standard Fin. Corp. v. Breland, 163 So. 2d 232, 236 (Miss. 1964)."

III. Law

A. The April 8, 2010 decision of the Mississippi Supreme Court, in this case, violated the U.S. Supreme Court cases in Bouie v. City of Columbia, 378 U.S. 347 (1964) and Rogers v. Tennessee, 532 U.S. 451 (2001), the Ex Post Facto Clause, and the Due Process Clauses in the U.S. Constitution.

Article VI, of the U.S. Constitution, provides, in part, that;

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." (emphasis added).

Thus, the Mississippi Supreme Court judges must

uphold all federal laws. Federal constitutional provisions, in the Ex Post Facto Clause and in the Due Process Clauses of the U.S. Constitution, have been explained by the U.S. Supreme Court as follows, with respect to the retroactive application of state court judicial changes in settled law;

In Bouie v. City of Columbia, 378 U.S. 347 (1964), the U.S. Supreme Court overturned convictions based on the South Carolina State Supreme Court's retroactive judicial expansion of a **civil** trespass statute. The Supreme Court explained the Bouie decision, in Rogers v. Tennessee, 532 U.S. 451 (2001), by writing that if "a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' [the construction] must not be given retroactive effect. Id., at 354 (quoting J. Hall, General Principles of Criminal Law 61 (2d ed. 1960)). We found that the South Carolina court's construction of the statute violated this principle because it was so clearly at odds with the statute's plain language and had no support in prior South Carolina decisions." 378 U.S., at 356." The U.S. Supreme Court explained that the Bouie "rationale rested on core due process concepts of notice, foreseeability, and, in

particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct." (emphasis added). The U.S. Supreme Court wrote, in Rogers, that its post-Bouie decisions "have applied Bouie's check on retroactive judicial decisionmaking not by reference to the ex post facto categories set out in Calder, but, rather, in accordance with the more basic and general principle of fair warning that Bouie so clearly articulated. See, e.g., United States v. Lanier, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); Marks v. United States, 430 U.S., at 191-192 (Due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties)...." (emphasis added).

B. The question becomes what judicial changes were made in Mississippi Supreme Court precedent and in Mississippi criminal statutes by the April 8, 2010 decision of Justice Graves before those changes were retroactively applied to this appeal of a criminal case?

1. In Duvall v. Duvall, 224 Miss. 546, 80 So. 2d 752 (1955), the Mississippi Supreme Court held that "It is equally well settled that **a judgment rendered by a court having no jurisdiction of the subject matter is void**, not merely voidable, and may be attacked directly or **collaterall**y, anywhere, and at any time." (emphasis added). As indicated above, Mr. Prewitt alleged in his complaint, and in his appellate brief to this Court that his Budweiser-beer conviction was void, in part, (a) due to Mississippi municipal courts lacking subject matter jurisdiction over minors because the Mississippi Constitution, in Article 6, 159(d), gives the Mississippi Chancery Courts jurisdiction over minors, (b) because Mr. Prewitt's federal due process rights, noted above, were violated, and (c) because Mr. Prewitt was completely innocent, as noted above, **as a matter of Mississippi criminal law**. Thus, for the 55 years prior to the April 8, 2010 decision of Justice Graves, Mississippi Supreme Court precedent had authorized collateral challenges to void judgments.

Without even making a cursory inquiry into whether Mr. Prewitt's Budweiser beer conviction was indeed void or attempting to distinguish the Duvall holding from the facts of Mr. Prewitt's case,

Justice Graves wrote that "We find that the record clearly supports a finding that Prewitt pursued a frivolous **collateral** action in circuit court and that the sanctions were appropriate." (emphasis added). Justice Graves, thus, overturned Duvall by holding (a) that a **collateral** action is no longer authorized in Mississippi to challenge a void judgment and (b) by retroactively applying that new Mississippi Supreme Court case law to this case.

To justify his refusal to honor Duvall's holding, Justice Graves cited a case, In re Chisolm, 837 So. 2d 183 (Miss. 2003), where the paramount issues involved matters which were within a trial judge's discretion, i.e., whether the denial of a continuance, and whether a misdemeanor trial that was held in the absence of the defendant, were appropriate objects for a mandamus writ. By contrast, Mr. Prewitt's appellate challenge to his Budweiser-beer-conviction rested on the fact that the complete absence of subject matter jurisdiction in the trial court rendered the Budweiser-beer-conviction void as a matter of law. If a "judgment is void, the trial court has no discretion. The court must set the void judgment aside." Soriano v. Gillespie, 857 So. 2d 64, 69-70

(¶22) (Miss. Ct. App. 2003). Seventy-Five (75) years ago, the Mississippi Supreme Court wrote that 'This Court has repeatedly held that our courts have the power to hear claims that public officials have violated their **mandatory**, **non-discretionary** duties of office." Poyner v. Gilmore, 171 Miss. 859, 158 So. 922 (1935) (emphasis added). Thus, Justice Graves overturned at least 75 years of Mississippi Supreme Court precedent by writing, on April 8, 2010, that Mr. Prewitt's filing of a collateral lawsuit, which sought the **mandatory** vacating of his void criminal conviction, was barred by the **discretionary** language in Chisolm, supra.

2. Justice Graves wrote, on April 8, 2010, that "In Chisolm, this Court specifically said: 'This Court will not allow a defendant, such as Chisolm, to circumvent the appellate process and seek such an extraordinary remedy when there is **an adequate remedy at law**.'" In re Chisolm, 837 So. 2d 183, 190 (Miss. 2003) (emphasis added). The problem with Justice Graves' quotation, as noted above, is that it ignores the fact that the Chisolm litigant was attempting to use a mandamus writ to appeal actions within the **discretion** of the trial judge while Mr. Prewitt is seeking the **mandatory** court relief which is legally required, pursuant to

long-settled Mississippi Supreme Court precedent in Duvall, Soriano, and Poyner, supra, whenever a **void** judgment is challenged. Other long-settled Mississippi Supreme Court case law makes it clear that Justice Graves' adequate-remedy-at-law assertion is incorrect, with respect to Graves' claim that mandamus relief is not authorized for void judgments in Mississippi. In McCoy v. McRae, 37 So. 2d 353 (Miss. 1948), the Mississippi Supreme Court held that a circuit court "would have only such jurisdiction as was vested in the . . . court from which the appeal was taken." In Jordan v. City of West Point, 75 So. 2d 465 (Miss. 1954), the Mississippi Supreme Court wrote that if a "justice of the peace has no jurisdiction, the circuit court acquires none on appeal." In Standard Fin. Corp. v. Breland, 163 So. 2d 232 (Miss. 1964), the Mississippi Supreme Court similarly held that if a justice court lacks jurisdiction, then a circuit court must dismiss any appeal from such a court.

Thus, for at least 62 years, the Mississippi Supreme Court had previously held that in appeals from lower courts without subject matter jurisdiction to the circuit court, the appellate circuit court would lack subject matter jurisdiction over such appeals. What the foregoing cases reveal is

that the trial de novo method of pursuing an appeal from a municipal court or a justice court to a Mississippi circuit court is legally inadequate, under the foregoing cases, **if** the municipal court or justice court lacked subject matter jurisdiction. Thus, prior Mississippi Supreme Court decisions demonstrate that the only adequate remedy at law for a judgment that is void due to a complete absence of subject matter jurisdiction, is for a reviewing court to set aside the void judgment either under a state-law based lawsuit, under Duvall, or pursuant to a federal lawsuit under 42 U.S.C. 1983. As the McCoy, Jordan, and Breland cases make plain, the trial-de-novo appellate procedure is simply inadequate when the underlying court decision is void due to a complete absence of subject matter jurisdiction.

Nevertheless, Justice Graves overturned the three foregoing Mississippi Supreme Court cases, in his April 8, 2010 decision and retroactively applied, on April 8, 2010, Justice Graves' new rule of appellate procedure to this challenge to a void criminal conviction. Justice Graves' new rule of appellate procedure, for void judgments in Mississippi, is that irrespective of the Mississippi Supreme Court holdings in Duvall, Poyner, McCoy,

Jordan, and Breland, the **discretionary** language in Chisolm now controls the appellate challenges to void judgments rather than the settled precedent in the **mandatory** void judgment procedure outlined in the cases of Duvall, Poyner, McCoy, Jordan and Breland.

3. In Wilbourn v. Equitable Life Assurance Society of the United States, 998 So.2d 430, (¶12,¶13) (Miss. 2008), the Mississippi Supreme Court wrote that the "allegations in the complaint must be taken as true, and there must be no set of facts that would allow the plaintiff to prevail." citing Ralph Walker, Inc. v. Gallagher, 926 So. 2d 890, 893 (Miss. 2006). The Mississippi Supreme Court wrote, in Wilbourn, that 'This Court must find that there is no set of facts that would entitle a defendant to relief under the law in order to affirm an order granting the dismissal of a claim on a Rule 12(b)(6) motion." The Mississippi Supreme Court wrote in Weeks v. Thomas, 662 So. 2d 581, 583 (Miss. 1995) that "in order to survive a Rule 12(b)(6) motion, the complaint need only state a set of facts that will allow the plaintiff 'some relief in court.'" On April 8, 2010, Justice Graves and the Mississippi Supreme Court changed the law, on 12(b)(6) motions to dismiss, by affirming a circuit court decision which

asserted that Mr. Prewitt must demonstrate that he is entitled to the specific relief "he seeks" in his complaint.

Thus, prior to April 8, 2010, the Mississippi Supreme Court's opinions reflected that Mr. Prewitt need only prove that his complaint entitled him to "relief under the law" or to "some relief" by a court in order to raise a legitimate defense against a 12(b)(6) motion to dismiss. However, Justice Graves' April 8, 2010 opinion changed the 12(b)(6) rules and declared that Mr. Prewitt must demonstrate that Mr. Prewitt was entitled to the **exact** relief that Mr. Prewitt "seeks" in his complaint.

The reason for Justice Graves' insistence that Mr. Prewitt be restricted to the **mandamus** relief that Mr. Prewitt sought in his complaint, notwithstanding the fact that Mr. Prewitt's complaint also sought **declaratory** relief and **injunctive** relief, was that it permitted Justice Graves to claim that Chisolm's denial of **mandamus** relief was "directly on point and binding on this Court" in Mr. Prewitt's case. Justice Graves wrote the following:

"**Clearly established Mississippi law** provides that the writ of mandamus is an extraordinary remedy

and may not be granted as a substitute for other review. See In re Chisolm, 837 So. 2d 183 (Miss. 2003). In Chisolm, the Mississippi Supreme Court held that a writ of mandamus was an improper method for a plaintiff to challenge his justice court conviction because all his objections could be addressed through the statutory appeal process, which provided for a trial de novo. **The Chisolm Court also held that a writ of mandamus may not be used to direct the outcome of an official action**. The Court finds that Chisolm is **directly on point** and **binding** on this Court." (emphasis added).

But, as noted above, the 2003 Chisolm case only dealt with mandamus as it related to the **discretionary** duties of a trial court judge. It is noteworthy that Justice Graves authored the opinion in Aldridge v. West, 929 So. 2d 298 (Miss. 2006) which stated that "private citizens **may** only **bring** a **mandamus** action 'to **compel public officials and bodies** to act only **as to non-discretionary duties** plainly **required** by **law**.'" (emphasis added).

Thus, Justice Graves **knew** that mandamus actions had long been used in Mississippi to compel **mandatory** actions by public officials, and

that Mr. Prewitt, in seeking court relief from a **void** criminal conviction, was authorized to "seek" **mandatory** relief under Graves' own words in Aldridge. Justice Graves' insistence on applying retroactive judicial changes in Mississippi Supreme Court precedent to Mr. Prewitt's case, personifies why U.S. Circuit Court Judge Henry J. Friendly, in a concurring opinion in United States v. Rubin, 609 F.2d 51, 69 (2d Cir. 1979), wrote that "A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word "hold." When eminent jurists like Justice Graves, and the Mississippi Supreme Court, cite irrelevant cases like Chisolm, they appear to consciously stray from the judicial moorings of issue-based determinations to engage in the legislative business of creating legal codes, based on the identity of the litigants, rather than going about the judicial business of deciding cases without deference to outside influences.

Justice Graves also changed the prior Mississippi Supreme Court case law, as outlined in Wilbourn, supra, which posited that if a trial court judge considered any information outside the complaint in deciding a 12(b)(6) motion, the trial court judge must convert the 12(b)(6) motion into a summary

judgment motion and provide the parties with 10 days notice. Because the trial judge clearly lifted language from motions and considered information from sources other than the complaint without converting the 12(b)(6) motion into a summary judgment motion, Justice Graves' new rule means that a trial judge may consider any and all evidence, from whatever source outside the complaint, and still have the trial judge's 12(b)(6) orders affirmed on appeal to this Mississippi Supreme Court. Justice Graves, and the Mississippi Supreme Court, then retroactively applied that 12(b)(6) change in settled Mississippi Supreme Court law to Mr. Prewitt's criminal appeal.

4. Justice Graves completely bypassed the federal constitutional claims, noted above, in Mr. Prewitt's complaint. That is a drastic change, and a possible resurrection of the discredited states' rights doctrines of interposition and nullification of federal law. Thus, by ignoring the federal constitutional claims in Mr. Prewitt's complaint, Justice Graves and the Mississippi Supreme Court departed from the federal constitutional requirement that Mississippi state judges must enforce federal law under Article VI of the U.S.

Constitution.

5. In affirming a fine of almost $8000 on Mr. Prewitt's attorney for daring to file a complaint about the **void** (for lack of subject matter jurisdiction and federal due process violations) conviction of Mr. Prewitt who is innocent **as a matter of Mississippi criminal law in MCA 67-1-81(2)**, Justice Graves and the Mississippi Supreme Court somehow overlooked the fact that counsel opposite were alleged to lack a valid employment contract, to represent the Oxford Municipal Court Judge who issued the void criminal judgment, that should have been created pursuant to MCA 25-1-47. Selective and retroactive enforcement of punitive measures, apparently on the prohibited and invidious basis of racial discrimination with respect to the African-American attorney on one side and the Caucasian attorneys on the other side , should always invite a searching scrutiny under the Ex Post Facto Clauses, the Due Process Clauses, and under the federal statutes which prohibit such judicial inequity.

6. Even assuming that the conviction of Mr. Prewitt was not void for lack of subject matter jurisdiction, and even assuming that Mr. Prewitt is not innocent of the charge under MCA 67-1-81(2) **as a matter of**

Mississippi criminal law, the Oxford Municipal Court judge expanded the criminal statute of MCA 67-1-81(2) by imposing punishment not authorized by the Mississippi Legislature. Justice Graves and the Mississippi Supreme Court retroactively approved, **sub silentio**, the illegal modification of MCA 67-1-81(2) by the Oxford Municipal Court Judge.

Conclusion

This Court, in its April 8, 2010 decision in this case, engaged in what the Bouie Court called "unexpected and indefensible" changes in settled Mississippi Supreme Court precedent, and in Mississippi's criminal statutes, which is prohibited by the Ex Post Facto Clause and the Due Process Clauses in the U.S. Constitution. Mr. Prewitt respectfully requests that the April 8, 2010 decision be reversed and the lower court be instructed to order the setting aside of Mr. Prewitt's Budweiser beer conviction because, in part, the trial court lacked subject matter jurisdiction and because Mr. Prewitt is completely innocent **as a matter of Mississippi statutory law**. It goes without saying that the almost $8000 fine of Mr. Prewitt's attorney,

for daring to file a complaint seeking to reverse the void criminal conviction of an innocent man, should also be reversed.

George Dunbar Prewitt, Jr.
P.O. Box 1226
Greenville, MS 38702-1226

Certificate of Service

I certify that I have served a copy of Mr. Prewitt's Motion for Rehearing on Mayo Mallette, PLLC, at its address of P.O. Box 1456, Oxford, MS 38655 and on Albert Smith III at P.O. Box 478 Cleveland 38732 by first class mail, postage prepaid on April 17, 2010.

George Dunbar Prewitt, Jr.

Certificate of Filing

I certify that I will serve an original and ten (10) copies of Mr. Prewitt's Motion for Rehearing, on the Clerk, Mississippi Supreme Court, P.O. Box 249, Jackson, MS 39205 by first class mail, postage prepaid on April 17, 2010.

George Dunbar Prewitt, Jr.

Mississippi Supreme Court, En Banc

2009-CA-00684-SCT

Richard A. Prewitt
v.
City of Oxford, Mississippi, Oxford Municipal Court and Lawrence L. Little;

Lafayette Circuit Court; LC Case #: L08-769; Ruling Date: 04/16/2009; Ruling Judge: Albert Smith, III;

Motion for rehearing filed by appellant is denied.